PERBADANAN KEMAJUAN NEGERI SELANGOR

v.

TEO KAI HUAT BUILDING CONTRACTOR

FEDERAL COURT, KUALA LUMPUR
SUFFIAN LP
SYED OTHMAN FJ
ABDUL HAMID OMAR FJ
[CIVIL APPEAL NO. 35 OF 1979]
3 FEBRUARY & 31 MARCH 1982

CIVIL PROCEDURE: *Cause of action - Whether it lay in detinue or conversion - Wrongful detention and refusal to deliver - Whether relief in form of return of chattel or damages for wrongful detention or value of chattel and damages for wrongful detention.*

DAMAGES: *In detinue for original wrongful detention - For loss of use.*

Under an agreement dated 1 June 1975, the respondents were sub-contractors of Messrs. Pribumi Sdn. Bhd. (the main contractors) who had a contract with the appellants for the construction of houses. On 6 October 1976, the appellants terminated the contract with Messrs. Pribumi as a result of which the sub-contract between the respondents and Pribumi was also terminated.

The respondents alleged that the appellants wrongfully refused to permit them to remove their machinery and wrongfully deprived them of the same and that they wrongfully detained the machinery in consequence of which they suffered loss and damage. Accordingly they claimed for loss of use of the machinery; for an order for the delivery up by the appellants of the machinery and damages for detention and/or conversion.

In December 1977, the respondents applied by way of summons in chambers for the appellants' defence to be struck out and liberty to enter judgment against the appellants. On 10 August 1978, Harun J made an order striking out the defence and a further order that a date for assessment of damages be fixed. On 24 January 1979, the Judge awarded damages of RM63,771.62 being general damages and RM71,280 as special damages. The appellants appealed.

The appellants urged that the claim was essentially one in detinue and the correct measure of damages should therefore be in detinue. On the other hand, the respondents argued that the claim was for conversion and the correct measure of damages should be for conversion.

The issues for determination were therefore (a) whether the claim was one founded upon an action in detinue or for wrongful conversion and (b) in either case what the correct measure of damages was.

Held:

[1] The respondent's claim was substantially founded not in conversion but in detinue. The respondents were deprived of the use of the machinery, which was made use of by the appellants during the period of wrongful detention.

> An action lies for the specific recovery of personal chattels wrongfully detained from the person entitled to the possession of them, and also for damages occasioned by the wrongful detainer. The technical name of this action is 'Detinue' (*Bullen & Leake*, 12th Edn., No. 5 at p. 358).

> The injurious act being the wrongful detention of the goods, and not the original taking or obtaining of the possession, it is immaterial whether they were obtained by the defendant by lawful means, as by a bailment or finding, or by a wrongful act, as by a trespass or conversion. The usual evidence of the detention is that the defendant, having the possession or control over the goods, does not deliver them to the plaintiff when demanded [*Jones v. Dowle* [1841] 9 M. & W. 19]. Where there was neither demand nor refusal, no action lay (*Clayton v. Le Roy* [1911] 2 K.B. 1031) (*Bullen & Leake* at p. 359).

[2] The Judge had not acted erroneously when he chose to award damages instead of ordering the return of the machinery, even though the respondents had claimed for its return. From the report of the Regional Director of valuation it was evident that all the machinery and equipment had been left on site for quite some time and they were not in working condition. The offer by the appellants to return the machinery was made only some 1½ years after the appellants had wrongfully detained them, and the condition of the machines and equipment was attributable directly to and mainly on account of the wrongful use by the appellants.

[3] The Judge had not acted erroneously when he gave judgment in the form of the value of the chattel as assessed and damages for its detention.

Per Curiam in *General and Finance Facilities, Ltd v. Cooks Cars (Romford), Ltd* [1963] 2 All E.R. 314, Diplock LJ (as he was then), after distinguishing detinue from conversion, dealt with the form of judgment in an action in detinue and at p. 319 said:

> In the result an action in detinue today may result in a judgment in one of three different forms: (i) for the value of the chattel as assessed and damages for its detention; or (ii) for return of the chattel or recovery of its value as assessed and damages for its detention; or (iii) for return of the chattel and damages for its detention. A judgment in the first form is appropriate where the chattel is an ordinary article in commerce, for the court will not normally order specific restitution in such a case, where damages are an adequate remedy [see *Whiteley Ltd. v. Hilt* (16)]

[4] But the Judge erred in his assessment of damages pertaining to (a) the damages for the value of the machinery and its fall in value and (b) the special damages for the wrongful use by the appellants during the period of wrongful detention.

(i) The value of the machinery at date of wrongful refusal:

It was necessary to determine, first, the value of the machinery and equipment at the date of the wrongful refusal by the appellants. The figure arrived at by the Regional Director of Valuation of RM55,730 seemed a fair and reasonable assessment. The report was prepared after the Regional Director had inspected the machinery at the relevant date (October 1976) and he had taken into consideration various factors such as the cost of replacement, annual depreciation, the use by the respondents for a year and the use by the appellants after the date of their refusal to deliver the machinery to the respondents.

In the circumstances and on the materials before the court, it would have been proper for the Judge to determine first the value of the machinery as at the date of judgment (10 August 1978) and then to award that sum to the respondents and, in addition, a further sum representing the fall in value for the period between the wrongful detention and the date of the judgment.

Taking RM21,550 (the figure submitted by the appellants as on 5 April 1978) to be the value as at the date of judgment (10 August 1978) and a further sum of RM34,180 representing a fall in value, total figure of RM55,730 should have been awarded. Even if

a lower value had been assessed for the machines and equipment at the date of judgment, the total sum would still be the same. The Court had to assess in the above manner as it was unable to obtain a figure to represent the value at the date of judgment (10 August 1978).

Therefore, the award for the value of machinery including the fall in value must be reduced to RM55,730.

(ii) Claim for loss of use:

Secondly, regarding the claim by the respondents for the loss of use, damages for loss of hire at the market rate should be awarded to the respondents but the assessment must be for a period between the date of wrongful refusal by the appellants and the date of judgment. In this regard the appellants' calculations for over a period of 18 months could not be accepted. The proper sum to be awarded must be calculated over a period of 22 months, and this came to RM61,280. The respondents, on the other hand, were not entitled to receive the charged for a period beyond the date of judgment as on that date they were already awarded not only the value of the machinery but also a fall in value. Accordingly, the sum awarded should be reduced from RM71,280 to RM61,280

(iii) Value of machinery at date of judgment:

Finally, the total sum for the value of the machinery of RM24,027.62 (RM21,550 accepted as value of machinery as at date of judgment and RM2,477.62 being the agreed value of a certain diesel engine) must be added to the damages awarded.

Per Curiam - In an action in detinue, the value of the goods to be paid to the respondents in the event of the appellants failing to return the goods to the respondent must be assessed at the date of the verdict of judgment in the respondents' favour and not at the date of refusal. [*Rosenthal v. Alderton & Sons Ltd.* [1946] 1 K.B. 374 (CA) which was referred to in *General and Finance Facilities, Ltd. v. Cooks Cars (Romford), Ltd.*]

In addition, a plaintiff may also recover damages in respect of the wrongful detention between the date of the refusal and the date of the actual return or the date of the payment of the value. (*Rosenthal v. Alderton & Sons Ltd. supra*)

[Appeal allowed with costs.]

Cases referred to:
General and Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd. [1963] 2 All ER 314
Rosenthal v. Alderton & Sons Ltd. [1946] KB 374

Other source referred to:
Bullen & Leake, 12th Edn., No. 5, p. 358

For the appellants - Lloyd Fernando; Zain & Co.
For the respondents - Matthias Chang; Suhaimi, Khor, Zulkifli & Chang

JUDGMENT

Abdul Hamid Omar FJ:

Perbadanan Kemajuan Negeri Selangor is dissatisfied with the decision of Harun J who ordered them to pay the respondents Teo Kai Huat Building Contractor a sum of RM63,771.62 being general damages and a sum of RM71,280 as special damages.

On 21 December 1977, the respondents applied by way of summons-in-chambers for the appellants' defence to be struck out and liberty to enter judgment against the appellants. On 10 August 1978, Harun J made an order striking out the defence and a further order that a date for assessment of damages be fixed by the Senior Assistant Registrar. On 24 January 1979, the learned Judge awarded damages as aforesaid. Hence the appeal.

The facts, not seriously in dispute, are that the respondents are the owners of:

i) 3 units - 12 HP Air-cooled Diesel Driven Concrete Hoist
(Model IMMACO TA-2)
Serial Nos: 3809 SL217
7409161
7508171

ii) 2 units - Liner 1250 KG Dumper
Engine Nos: 2000-STI-A24
72-STI-A24

iii) 1 unit - 77 Winget PH 1 Concrete Mixer
Engine No: 55916

iv) 1 unit - 14 T Winget PH 2 Concrete Mixer Engine No: 37410

v) 1 unit - 7 TH/L Winget Concrete Mixer
c/w 6.6 Lister
Engine Nos: 1321 - LD2 - Z18.

Under the agreement dated 1 June 1975, the respondents were sub-contractors of Messrs. Pribumi Sdn. Bhd. (the main contractors) who had a contract with the appellants for the construction of 234 units of link houses at Sungai Way Subang. On 6 October 1976, the appellants terminated the contract with Messrs. Pribumi as a result of which the sub-contract between the respondents and Pribumi was also terminated.

The respondents alleged that the appellants wrongfully refused to permit them to remove the machinery and wrongfully deprived them of the same. They also alleged that the appellants wrongfully detained the machinery in consequence of which they suffered loss and damage. Accordingly they claimed for loss of use of the machinery; for an order for the delivery up by the appellants of the machinery and damages for detention and/or conversion.

At the hearing of the appeal, Mr. Fernando Counsel for the appellants argued that this was essentially a claim in detinue and the correct measure of damages should therefore be in detinue. On the other hand, Mr. Matthias Chang for the respondents argued that the claim was for conversion and the correct measure of damages should be for conversion.

To begin with, we shall determine (a) whether this was a claim founded upon an action in detinue or for wrongful conversion and (b) in either case what is the correct measure of damages.

The evidence reveals that upon the termination of the contract between the appellants and the main contractors and consequently the respondents and the main contractors, the appellants refused to allow the respondents to remove the machinery and thereafter wrongfully detained them. This is not denied by the appellants. An examination of the respondents' claim discloses that the action was founded, in the main, upon an allegation that there was wrongful detention of the machinery by the appellants and this arose as a result of the appellants' refusal to allow the respondents to remove the machinery. We have said "in the

main" because the respondents have made an alternative claim for damages for conversion in the prayer to the statement of claim. No specific allegation is however made in the body of the statement of claim. In our view the respondents' claim was substantially founded not on conversion but in detinue.

It is in evidence that the respondents were deprived of the use of the machinery. It is also in evidence that the appellants made use of the machinery during the period of wrongful detention. Our determination would therefore revolve on the question of the correct measure of damages to be applied.

The appellants have contended that the respondents' claim was a claim of detinue. We have dealt with that question in so far as it seems to us to emerge from the pleadings. The appellants have also contended that the correct measure of damages should be damages in detinue. We shall consider this question shortly. Counsel for the appellants drew our attention to the fact that the respondents had claimed for the return of the machinery and the learned Judge should therefore have ordered for their return and damages should only be awarded in respect of the detention of the machinery

Before we deal with the measure of damages, we would observe that the respondents did pray for the return of the machinery and no such order was made by the learned Judge instead he awarded damages. We have not had the benefit of the learned Judge's grounds of decision but judging from the evidence available it is significant to note that the valuation report dated 3 January 1979 (D4) prepared by the Regional Director of Valuation and produced at the hearing for the assessment of damages shows that all the machinery and equipment had been left on site for quite some time and they were not in working condition. They could no doubt be repaired and resold. It is in evidence that on 5 April 1978, the appellants offered to return the machinery to the respondents but according to the respondents they could not be used and were therefore useless to them. It must also be stressed that the offer was only made some 1½ years after the appellants had wrongfully detained and used the machinery. Viewed in this light we are unable to say that the learned Judge had acted erroneously when he chose to award damages instead of ordering the return of the machinery. What we must determine is whether the learned Judge was right in his assessment of the damages.

At this point we would observe that there is a significant factor that emerges from the record, namely, the wrongful use by the appellants of the machinery during the period of detention. It is in evidence, and this is not disputed, that the appellants did use the machinery during that period, however, for how long and to what extent it is not quite clear. The appellants assumed that they had the right to use the machinery and this is evident from the statement of defence as well as the affidavit affirmed by Abdul Aziz bin Ismail, secretary of the appellants. It can also be gathered from the valuation report made by the Director of Valuation that the appellants took over the machines in their existing state and carried on using them. In this regard the respondents' Counsel also drew the learned Judge's attention to this fact. The evidence therefore discloses quite clearly that the condition of the machines and equipment as the Director of Valuation found them to be was attributable directly to and mainly on account of the wrongful use by the appellants.

We now turn to consider the question of the correct measure of damages. Before we do so, it would be useful to examine briefly the law to find support for our finding that the respondents' claim was substantially a claim in detinue.

With reference to an action in detinue, *Bullen & Leake* 12th Edn., No. 5 p. 358 that:

> An action lies for the specific recovery of personal chattels wrongfully detained from the person entitled to the possession of them, and also for damages occasioned by the wrongful detainer (3 B1. Com. 151). The technical name of this action is 'Detinue'. The gist of the action is the wrongful detention of goods, and, in general, therefore, it is an action for a wrong independent of contract, and is founded on tort (see *Bryant v. Herbert* [1878] 3 CPD 389); there must be 'some definite act or deliberate withholding as a necessary preliminary to the arising of this cause of action' (*Clayton v. Le Roy* [1911] 2 KB 1031 at 1048).

And at p. 359 speaking of right of action it is stated that:

> To support the action, the plaintiff must have the right to the immediate possession of the goods at the time of commencing the action, arising out of an absolute or a special property;
>
> The injurious act being the wrongful detention of the goods, and not the original taking or obtaining of the possession, it is immaterial whether they were obtained by the defendant by lawful means, as by a bailment or finding, or by a wrongful act, as by a trespass or conversion. The usual evidence of the detention is that the defendant, having the possession or control over the goods, does not deliver them to the plaintiff when demanded (*Jones v. Dowle* [1841] 9 M & W 19). Where there was neither demand nor refusal, no action lay (*Clayton v. Le Roy, ante*).

On the question of relief claimed and the measure of damages, it is stated also at p. 359 as follows:

> As to the measure of damages for detinue where the chattels detained by the wrong doer are normally let out on hire by their owner, see *Strand Electric Co. v. Brisford Entertainments* [1952] 2 QB 246; *Capital Finance Co. Ltd. v. Bray* [1964] 1 WLR 323. The damages may include not only those for the original wrongful detention, but also damages for all subsequent wrongful detention until redelivery (*Serrao v. Noel* [1885] 15 QBD 549, 559). Special damages may also be recovered if properly claimed. Damages must be assessed at the date of judgment and not at the date of refusal (*Rosenthal v. Alderton & Sons Ltd.* [1946] KB 374).

In this regard we would refer to the judgment of Diplock LJ (as he then was) in *General and Finance Facilities, Ltd. v. Cooks Cars (Romford), Ltd.* [1963] 2 All ER 314 where at p. 317, he said that:

> There are important distinctions between a cause of action in conversion and a cause of action in detinue. The former is a single wrongful act and the cause of action accrues at the date of the conversion; the latter is a continuing cause of action which accrues at the date of the wrongful refusal to deliver up the goods and continues until delivery up of the goods or judgment in the action for detinue ... Demand for delivery up of the chattel was an essential requirement of an action in detinue and detinue lay only when at the time of the demand for delivery up of the chattel made by the person entitled to possession the defendant was either in actual possession of it or was estopped from denying that he was still in possession.

Further at p. 318 he went on to say that:

> The action in conversion is a purely personal action and results in a judgment for pecuniary damages only. The judgment is for a single sum of which the measure is generally the value of the chattel at the date of the conversion together with any consequential damage flowing from the conversion and not too remote to be recoverable in law ...
>
> On the other hand, the action in detinue partakes of the nature of an action *in rem* in which the plaintiff seeks specific restitution of his chattel. At common law it resulted in a judgment for delivery up of the chattel or payment of its value as assessed, and for payment of damages for its detention.

In the same case Diplock LJ also dealt with the forms of judgment in an action in detinue and at p. 319 said:

> In the result an action in detinue today may result in a judgment in one of three different forms: (i) for the value of the chattel as assessed and damages for its detention; or (ii) for return of the chattel or recovery of its value as assessed and damages for its detention; or (iii) for return of the chattel and damages for its detention. A judgment in the first form is appropriate where the chattel is an ordinary article in commerce, for the Court will not normally order specific restitution in such a case, where damages are an adequate remedy (see *Whiteley, Ltd. v. Hilt*).

The learned Judge chose the first form of judgment when he awarded damages to the respondents evidently to represent the value of the machinery and damages for the wrongful detention and also special damages for loss of use during the period of wrongful detention. Against that the appellants contended that in so doing the learned Judge acted erroneously. We hardly think so in the light of the reasons we have adverted to earlier. But where we think the learned Judge has erred is in his assessment of damages pertaining to (a) the damages for the value of the machinery and its fall in value and (b) the special damages for the wrongful use by the appellants during the period of wrongful detention.

First, the value of the machinery: we do not exactly know how the learned Judge arrived at a sum of RM63,771.62. Counsel for the appellants urged upon us to assess the value at RM34,180 representing a fall in value calculated on the basis of RM55,730, the value as at 6 October 1976, (the date of wrongful refusal by the appellants) less RM21,550, the value as at 5 April 1978 (the date of the offer by the appellants to re-deliver the machines). The appellants also urged upon us to award only this sum and no other, or, alternatively, a sum of RM51,660 representing the market rate for the hire of the machinery worked out as follows:

(18 months up to date of re-delivery 5 April 1978)

2 units x RM540 x 18:	RM16,200
2 units x RM330 x 18:	RM11,880
1 unit x RM360 x 18:	RM 6,480
1 unit x RM510 x 18:	RM 9,180
1 unit	RM 5,980
Hire:	RM51,660

The appellants submitted that in an action in detinue the value of the goods to be paid to the respondents in the event of the appellants failing to return the goods to the respondents must be assessed at the date of the verdict or judgment in the respondents' favour and not at the date of the refusal (see *Rosenthal v. Alderton & Sons Ltd.* [1946] KB 374, CA). This case was referred to by Diplock LJ in the case of *General and Finance Facilities, Ltd. v. Cooks Cars (Romford), Ltd., supra.*

Close examination of *Rosenthal v. Alderton & Sons Ltd.* reveals that apart from the value of the goods to be assessed at the date of the judgment, a plaintiff may also recover damages in respect of the wrongful detention between the date of the refusal and the date of the actual return or the date of the payment of the value. In the judgment of the Court read by Evershed J at p. 378, it is stated that:

> The significance of the date of the refusal of the plaintiff's demand is that the defendant's failure to return the goods after that date becomes and continues to be, wrongful. Moreover, the plaintiff may recover damages in respect of the wrongful 'detention' after that date, e.g., where the plaintiff has suffered loss from a fall in value of the goods between the date of the defendant's refusal and the date of actual return (see *William v. Archer*), and such damages must equally continue to run until the return of the goods or (in default of return) until payment of their value.

Applying the principles to the present case, it seems necessary to determine, firstly, the value of the machinery and equipment at the date of the wrongful refusal by the appellants. The evidence adduced by the respondents through Tengku Haizam Ahmed, the chartered surveyor who prepared the report (Ex. P1), provides no assistance whatever as no value is given as at that date. Tengku Haizam admitted that he did not know the value of the machinery in October 1976 as it was difficult to assess in retrospect without personal inspection. The report put in evidence by the appellants through the Regional Director of Valuation, however, after giving an allowance for the depreciation, provides a figure RM55,730 as the value of the machinery on 6 October 1976. In arriving at this figure he took into consideration the fact that the concrete mixers, items 1, 2 and 3, were purchased by the respondents as refurbished machinery and the rest were new. He also gave a figure of RM14,880 as the value of the machinery on 24 January 1979, some six months after the date of the judgment (10 August 1978). The figure arrived at by the Regional Director of Valuation seems fair and reasonable and we consider it to be a fair assessment. The report was prepared after he inspected the machinery and he took into consideration in his report various factors such as the cost of replacement now, annual depreciation, the fact that the respondents had used the machinery for approximately a year after they were acquired up to 6 October 1976, and also the fact that the appellants had used the machines and equipment after the date of their refusal to deliver them to the respondents. It is our view that in the circumstances and on the materials before us, it would have been proper for the learned Judge to determine first the value of the machinery as at the date of judgment, i.e. on 10 August 1978, and then to award that sum to the respondents and, in addition, a further sum representing the fall in value for the period between the wrongful detention and the date of the judgment. Calculated on that basis and using the figure submitted by the appellants, i.e. the sum of RM21,550 as on 5 April 1978, to be the value as at the date of judgment a further sum of RM34,180 representing a fall in value, the total figure RM55,730 should have been awarded, even if a lower value is assessed for the machines and equipment as at the date of judgment, the total sum would still be the same. We have assessed in this manner because we are unable to obtain a figure to represent the value as at 10 August 1978, and would accept for purposes of this case the sum of RM21,550 as the value of the machinery as at that date. Therefore the award for the value of machinery including the fall in value is reduced to RM55,730 and to that extent we allow the appeal and make an order accordingly.

Secondly, there is a claim by the respondents for the loss of use. We are of the view that damages for loss of hire at the market rate should be awarded to the respondents but the assessment shall have to be for a period between the date of wrongful refusal by the appellants and the date of judgment, i.e., as at 10 August 1978. In this regard we cannot accept the appellants' calculation and the proper sum to be awarded to the respondents shall therefore be calculated over a period of 22 months as follows:

(22 months up to the date of judgment, i.e., on 10 August 1978)

2 units x RM450 x 22: RM19,800

2 units x RM330 x 22: RM14,520

1 unit x RM360 x 22: RM 7,920

1 unit x RM510 x 22: RM11,220

1 unit x RM360 x 22: RM 7,920

RM61,280

The respondents are clearly disentitled to receive the charges for a period beyond the date of judgment as on that date they are already awarded not only the value of the machinery but also for the fall in value. Accordingly we would allow this appeal by reducing the sum awarded by the learned Judge in respect of loss of use from RM71,280 to 61,280.

Finally, there remains this sum of RM2,477.62 being the agreed value of the diesel engine for item 8(ii) which we have to add to the damages awarded for the value of this machinery. The total sum for the value of the machinery shall therefore be a sum of RM24,027.62 (RM21,550 + RM2,477.62).

For reasons we have stated the appeal is therefore allowed with costs.

Also found at [1982] CLJ 352